BURHANUDIN ZAINAL AZMAN A

v.

SUNRISE PALACE SDN BHD

HIGH COURT MALAYA, IPOH B
CHOONG SIEW KHIM JC
[CIVIL SUIT NO: 22NCVC-16-2011]
23 DECEMBER 2011

CONTRACT: *Misrepresentation - Sale and purchase of property - Housing developer - Representation that housing project provides with gated and 24 hours' security guard control system - Failure to provide system - Reliance on brochure - Allegation of - Whether there was breach of contract - Whether meaning of security patrol could be distinguished from 24 hours' security guard control system - Whether there was admission of representation made of gated community prior to signing of sale and purchase agreement - Whether defendant misrepresented plaintiff* C D

This was the plaintiff's claim against the defendant for misrepresentation. The plaintiff purchased a house ('the house') from the defendant ('the developer') and moved into the house on 3 June 2009 after receiving vacant possession on 21 January 2009. It was the plaintiff's allegation that he had relied on the brochure of the housing project and claimed that the defendant's agents, through their advertisement, catalogue and miniature replica of the housing project, represented to the plaintiff that the said project would be provided with a gated and 24 hours' security guard control system. The provision of the two systems had induced the plaintiff to purchase the house from the defendant. However, those two systems were not provided for after the plaintiff had moved into the house. As a result, it was alleged that there were incidences of house-breaking, robbery and loss of property. Consequently, the plaintiff together with four other house-owners met the director of the defendant with regards to their purported promise of the gated system. The defendant subsequently wrote a letter to Majlis Bandaraya Ipoh ('MBI') and applied for MBI's approval to fence the housing area. It was the defendant's submission, *inter alia*, that (i) no representation was made that the housing project would take the form of a gated community; (ii) it only agreed to offer a 24 hours' security patrolling service and not otherwise; (iii) request was made to the defendant to build a fence around the housing area by house- E F G H I

buyers who had moved in; and (iv) the defendant agreed to build a fence around the housing area if the house buyers agreed to execute a separate agreement and until they obtained approval from MBI.

Held (dismissing plaintiff's claim with costs):

(1) "Misrepresentation" is merely descriptive of a false pre-contractual statement that induces a contract or other transaction. It however does not reflect the state of mind of the representor at the relevant time. The state of mind of the representor at the time he made the representation to the representee varies according to the circumstances of each case. It may be fraudulent, negligent or innocent. In innocent misrepresentation, the mind is free of deceit and inadvertence. It is the particular state of mind of the representor that determines the nature of the remedy available to the representee. (para 10)

(2) Misrepresentations, whether fraudulent, negligent or innocent, renders a contract voidable at the instance of the representee. (*Sim Thong Realty Sdn Bhd v. Teh Kim Dar*; refd). (para 10)

(3) The plaintiff's statement of claim neither alleged fraud nor negligence. In such absence, it was apparent that the plaintiff's assertion was that of innocent misrepresentation and a representee who had been induced by an innocent misrepresentation was only entitled to rescission and consequent restitution without entitlement to recover damages. Further, the plaintiff's claims for specific performance and damages were not sustainable as his actions were not grounded on breach of contract or fraudulent/negligent misrepresentation. (*Sim Thong Realty Sdn Bhd v. Teh Kim Dar*; refd). (para 11)

(4) There was no representation of a gated housing area or community stated in the relevant brochure. There was instead an obvious representation of a "24 hours security patrolling service" which the defendant did provide for the first two years through two security guards who patrolled their housing area. The very essence and meaning of security patrol could be distinguished from a 24 hours' security guard control system. To patrol was to go around an area at regular times

to check that it was safe; it was not the same as providing guards to guard the housing area 24 hours a day. (*Low Kon Fatt v. Port Klang Golf Resort (M) Sdn Bhd*; dist) (*Kuthubul Zaman & Anor v. TJB Development Sdn Bhd & Anor*; dist). (paras 14 & 15)

(5) Any agreement by the defendant to build fencing around the housing area, subject to MBI's approval and the house-owners' agreement to sign a new agreement, was made in 2009, *ie*, after vacant possession was given and not prior to the execution of the sale and purchase agreement. Hence, the defendant did not misrepresent that the housing project would be provided with a gated and guarded security control system on a balance of probabilities. (paras 19 & 20)

Case(s) referred to:

Abdul Razak Datuk Abu Samah v. Shah Alam Properties Sdn Bhd & Another Appeal [1999] 3 CLJ 231 CA ***(refd)***

Kuthubul Zaman & Anor v. TJB Development Sdn Bhd & Anor [2010] 8 CLJ 529 CA ***(dist)***

Low Kon Fatt v. Port Klang Golf Resort (M) Sdn Bhd [1998] 3 CLJ Supp 301 HC ***(dist)***

Sim Thong Realty Sdn Bhd v. Teh Kim Dar [2003] 3 CLJ 227 CA ***(refd)***

Legislation referred to:

Contracts Act 1950, s. 19(1)

Evidence Act 1950, s. 114(g)

For the plaintiff - Faridzatul Shima Abd Hamid (Norhisham Sirat with her); M/s Shima & Co

For the defendant - YK Cheong; M/s Loh & Assocs

Reported by Kumitha Abd Majid

JUDGMENT

Choong Siew Khim JC:

[1] The defendant was the housing developer of a project known as Taman Klebang Damai at Chemor, Perak. The plaintiff purchased a double-storey terrace house from the defendant for the price of RM169,936 with the sale and purchase agreement signed on 9 January 2007. He moved into the house on 3 June 2009 after receiving vacant possession on 21 January 2009.

[2] It was the pleaded case for the plaintiff *vide* paras. (3) and (4) of the statement of claim that the defendant's agents through their advertisement, catalogue and miniature replica (of the housing project) represented to the plaintiff that the said project would be provided with a gated and 24 hours' security guard control system ("sistem kawasan berpagar"; "sistem kawalan keselamatan pengawal 24 jam"). The plaintiff (witness SP1) testified in the same manner *vide* his witness statement ("PSP1"). In his answer to question 5, he said:

> J5: Semasa saya melihat-lihat tawaran promosi projek perumahan di tapak rumah contoh defendan, saya telah didatangi oleh ejen-ejen defendan, bernama Ina dan Karen dan telah ditunjukkan oleh mereka iklan, katalog berserta mempamerkan replika miniatur bahawa projek Taman Klebang Damai akan dilengkapi dengan sistem kawasan perumahan dengan kawalan keselamatan pengawal 24 jam kepada sesiapa yang membeli hartanah di Taman Klebang Damai tersebut.

[3] SP1 referred to and relied on the brochure ("the brochure") on pp. 1 and 2 of the agreed bundle of documents ("bundle A") which was published by the defendant to promote the said project. He said this was what induced him to buy the house although the purchase price was rather high. He felt that the inclusion and provision of the gated and security guard services was worth the price. SP1 went on to state that these two systems were however not provided for after he had moved into his new home. There were incidents of house-breaking, robbery and loss of property as a result. Affected house-buyers like SP2 (Norfazli bin Mohd Noor) and SP3 (Faridatul Hanim bt Hamzah) lodged police reports (P1 and P2) pertaining to such incidents.

[4] SP1 nevertheless admitted that the defendant did provide two security guards; his grouse was that their service was not efficient and sufficient for a housing area of 164 houses. Consequently due to the spate of crime, SP1 together with four other house-owners met the director of the defendant by the name of Ronnie (ie, SD1, Lee Kong Choong) with regard to their purported promise of the gated system. SP1 alleged that the defendant subsequently wrote a letter (on p. 30 of bundle A) to Majlis Bandaraya Ipoh ("MBI") to this effect:

Tarikh: 25 Ogos 2009

Jabatan Perancang Bandar
MAJLIS BANDARAYA IPOH
Jalan Sultan Abdul Jalil
Greentown
30450 Ipoh
Perak

Tuan/Puan,

Per: Permohonan Kebenaran Untuk Memagar Kawasan Perumahan Di Taman Klebang Damai, 31200 Chemor, Perak

Kami merujuk kepada perkara tersebut di atas.

Kami di sini ingin memohon kebenaran untuk memagar kawasan perumahan kami yang terletak di Taman Klebang Damai, 31200 Chemor, Perak.

Tindakan segera pihak tuan dalam urusan tersebut di atas amatlah kami hargai.

Sila akui penerimaannya dengan menandatangani dan mengembalikan kepada kami salinan pendua surat ini.

Sekian, terima kasih.

Yang benar,
Sunrise Palace Sdn Bhd

t.t.
Lee Kong Choong
Pengarah

[5] The defendant responded to their complaint by applying for MBI's approval to fence the housing area of Taman Klebang Damai through this letter. However the fencing was never constructed and a notice of demand (on p. 31 of bundle A) was sent to the defendant. In addition, SP1 lodged a complaint through the press about the matter (see newspaper cutting on p. 34 of bundle A).

[6] SP2, SP3 and SP5 (Abdullah bin Muhammed @ Ahmad) in corroborating SP1 testified that the provision of the two systems had also induced them to purchase houses from the defendant.

[7] On the other hand, SD1 denied the defendant had ever made any representation that the housing project would take the form of a gated community. He explained it was only after the house-buyers had moved in and there were incidents of theft of water meters and iron drain-covers that there was a request for the defendant to build a fence around the housing area. SD1 testified that the defendant agreed to do so provided the house-buyers agreed to execute a separate agreement and until they had obtained approval from MBI. According to SD1, it was stated in the defendant's brochure of a 24 hours' security patrolling service ("perkhidmatan rondaan keselamatan 24 jam") which was not synonymous with security guards stationed at the guard house of a gated community. This was in line with the defendant's case that they had only agreed to offer a 24 hours' security patrolling service and not otherwise.

[8] SD1 also drew comparison with the defendant's other housing project known as Clearwater Bay Resort in Menglembu, Perak which was advertised in the brochure (D4) as a "gated and guarded community" with houses costing RM308,880 and above.

[9] It is pertinent to note that while the plaintiff, SP1, disagreed that security "control" and "patrolling" (as so stated in the brochure) were not the same, he and SP5 nevertheless agreed that the brochure did not state anything about a gated housing area/community. SP5 admitted that the reason he bought the house at Taman Klebang Damai was because it was cheaper than the houses at Bandar Baru Seri Klebang which cost RM260,000.

[10] The plaintiff's cause of action is obviously based on misrepresentation which is a false or untrue statement that the representee relied on in order to enter into a contract and had it not been for the alleged misrepresentation, the representee would not have entered into the contract. "Misrepresentation" is merely descriptive of a false pre-contractual statement that induces a contract or other transaction. It however does not reflect the state of mind of the representor at the relevant time. The state of mind of the representor at the time he made the representation to the representee varies according to the circumstances of each case. It may be fraudulent, negligent or innocent. In innocent misrepresentation, the mind is free of deceit and inadvertence. It is the particular state of mind of the representor that determines

the nature of the remedy available to the representee. Misrepresentation is thus aptly described in the Court of Appeal decision in *Sim Thong Realty Sdn Bhd v. Teh Kim Dar* [2003] 3 CLJ 227 with reference to s. 19(1) of the Contracts Act 1950 which provides that misrepresentations whether fraudulent, negligent or innocent renders a contract voidable at the instance of the representee.

[11] From a perusal of the plaintiff's statement of claim, his case alleged neither fraud nor negligence there being no specific and particularised plea of fraud or negligence. In such absence, it is apparent that the plaintiff's assertion is that of innocent misrepresentation and a representee who has been induced by an innocent misrepresentation is only entitled to rescission and consequent restitution without entitlement to recover damages (see p. 240 of *Sim Thong Realty Sdn Bhd (supra)*). On this score, the plaintiff's claim for specific performance and damages is not even sustainable as his action is not grounded on breach of contract or fraudulent/negligent misrepresentation (see *Abdul Razak Datuk Abu Samah v. Shah Alam Properties Sdn Bhd & Another Appeal* [1999] 3 CLJ 231).

[12] In *Low Kon Fatt v. Port Klang Golf Resort (M) Sdn Bhd* [1998] 3 CLJ Supp 301, which was relied on by learned counsel for the plaintiff, the plaintiff in that case was entitled to an order for rescission and a refund of RM32,000 which he paid for membership at the Port Klang Golf Resort because of a representation in the brochure regarding seasports facilities which were not fulfilled. These seasports facilities was the attraction that had induced the plaintiff to enter the contract with the defendant.

[13] In *Kuthubul Zaman & Anor v. TJB Development Sdn Bhd & Anor* [2010] 8 CLJ 529, a representation had clearly been indicated in the brochure about a second access road to the complex from which the plaintiff purchased two units of office space. The second access road had induced the plaintiff to enter into the sale and purchase agreement. However this access road did not materialise and the plaintiff, on appeal to the Court of Appeal, was allowed his loss that he incurred arising from the difference in value between an office unit with the additional access road against an office unit without the additional access road.

[14] In these two cited cases which can be easily distinguished, the representation was clearly stated in the brochures. In our present case, there was however no representation of a gated housing area or community stated in the relevant brochure. There was instead an obvious representation of a "24 hours security patrolling service" which SP1 and SP5 conceded the defendant did provide for the first two years through two security guards who patrolled their housing area.

[15] It was averred in no uncertain terms in the statement of claim that the defendant made representations about the gated and 24 hours' security guard control systems *vide* their advertisement, catalogue and a miniature replica. The miniature replica had since been dismantled and used for another housing project according to SD1. This was not rebutted in cross-examination. The plaintiff was effectively depending on the brochure to substantiate his claim that the said representation was made. Nothing was mentioned in this brochure about the said housing project being a gated community. The very essence and meaning of security patrol can be distinguished from the plaintiff's allegation of a 24 hours' security guard control system. To patrol is to go around an area at regular times to check that it is safe which is definitely, in my view, not the same as providing guards to guard the housing area 24 hours a day.

[16] I find that the plaintiff, by relying on the said brochure which does not state anything about a gated housing area or community, has failed to prove his claim of a misrepresentation in this respect. On the contrary, there was no representation of this that gave rise to liability. The plaintiff's testimony of misrepresentation is rebutted by his own documentary evidence in the form of the brochure. His contention that the defendant's sales agents Ina and Karen made that representation is rendered less credible by the printed form in the brochure.

[17] Consequently, I fail to appreciate the plaintiff's submission that failure by the defendant to call Ina and Karen to rebut his allegation made the defence case one of mere denial when he has in the first instance pleaded reliance on the brochure for the representation made by the defendant. The failure to call Ina and Karen, in my considered opinion, does not tilt the balance of probabilities in the plaintiff's favour and for the application of the

s. 114(g) Evidence Act 1950 presumption. In any event, Ina and Karen have stopped working for the defendant and their whereabouts were unknown according to SD1. In reiteration, the plaintiff's allegation of the defendant's representation has been rebutted by what was evidently stated in the brochure.

[18] The same rationale answers the plaintiff's submission that the defendant's application to MBI for permission to build fencing around the housing estate amounted to an admission of their representation made of a gated community prior to the signing of the sales and purchase agreement.

[19] In addition, SP4 (Azizuddin bin Alias) who is the Timbalan Setiausaha Bandaraya Ipoh, Bahagian Teknikal, testified that in the year 2009 when the defendant's letter (reproduced above) was sent and received by MBI, there were no guidelines in place about applications for gated housing communities and the law then did not allow for gated communities. He added for good measure in cross-examination that MBI would not have approved the application made by the defendant even in the event the defendant had followed the correct procedure (through submission of the necessary plans and processing fees). The plaintiff's submission that SD1's reference to what one Mr. Amin from MBI told him about the status of the application being hearsay is negatived by what SP4 had to say about the defendant's application. It was SD1's testimony that the letter was in response to the house-buyers' request to built a gate/fence to prevent unsavoury characters from entering their housing area when they came to see him about incidents of theft. On a final note, it must be emphasised that based on the prevailing facts and circumstances of this case, any agreement by the defendant to build fencing around the housing area, subject to MBI's approval and the house-owners' agreement to sign a new agreement, was made in 2009 after vacant possession was given and not prior to the execution of the sale and purchase agreement.

[20] Ultimately, I find that the defendant did not misrepresent that Taman Klebang Damai would be provided with a gated and guarded security control system on a balance of probabilities after having considered the evidence adduced in totality. The plaintiff's claim, being unsustainable, is hereby dismissed with costs.